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In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT T. DEVEREAUX, ET AL., PETITIONERS

v.

WILLIAM J. GEARY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MICHAEL CARVIN
DENNIS J. DIMSEY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the "collateral attack" doctrine applied by the courts below is consistent with the Due Process Clause.

2. Whether a consent judgment in an action brought under Title VII of the Civil Rights Act of 1964 is subject to the remedial limitations contained in Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g).

3. Whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g) of Title VII, as interpreted by this Court in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984).

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INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, prohibits, inter alia, racial discrimination in employment. Under Section 706(f)(1) of the Act, 42 U.S.C. 2000e-5(f)(1), the Attorney General is responsible for the enforcement of Title VII in cases such as this one in which the employer is a government, governmental agency, or political subdivision.

This case raises fundamental due process questions regarding the effect of a Title VII consent decree on the right of persons who are not parties to the decree to have their claims of unlawful employment discrimination heard on the merits in federal court. Additionally, the decision below rests in large part on the court of appeals' determination that this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), permits the entry of a consent decree, such as that at issue

here, that prescribes the use of racial quotas in making promotions. This Court's resolution of these issues will have a substantial effect on the Attorney General's enforcement responsibilities under Title VII.[1]

STATEMENT

1. In 1974, minority employees of the Commonwealth of Massachusetts filed an action against state officials challenging as racially discriminatory the hiring and promotion practices of several state agencies, including the Metropolitan District Commission (MDC) police force (Pet. App. 4a, 18a). After two years of negotiations, the parties submitted to the district court a stipulation of facts and a proposed consent decree. The stipulation represented that the facts described therein were "sufficient to sustain an action under Title VII of the Civil Rights Act of 1964 * * * " (*id.* at 4a). The consent decree required the affected state agencies, including the MDC, to establish a special minority eligibility list for each job category covered by the decree and to select applicants from that list, rather than from the usual civil service eligibility list, when necessary to meet or maintain the decree's "annual minority hiring objective" for the agency and job category (*id.* at 5a, 19a).

After learning of the proposed decree, four employee unions moved to intervene (*id.* at 5a).[2] The district court held a hearing on the entry of the consent decree and the motions to intervene. In August 1979, the court denied the motions to intervene as untimely and entered the stipulation of facts and the consent decree (*ibid.*).

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[1] The United States participated as amicus curiae in this case in the court of appeals.

[2] *I.e.*, the Massachusetts Organization of State Engineers and Scientists; Locals 285 and 509, Service Employees International Union, AFL-CIO; the Massachusetts Law Enforcement Council; and the National Association of Government Employees.

The denial of the motions to intervene as untimely was affirmed on appeal. *Culbreath* v. *Dukakis*, 630 F.2d 15 (1st Cir. 1980). After adopting (*id.* at 20) the four-pronged test of *Stallworth* v. *Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), for determining the timeliness of a petition for intervention,[3] the court of appeals candidly acknowledged (*id.* at 22): "We see little prejudice to the parties caused by the failure of the unions to intervene more promptly." The court felt (*ibid.*), however, that intervention by the unions at any point might cause "real prejudice" by "destroy[ing] the consent decree and forc[ing] a trial on the merits." The court stated (*ibid.*) that affirming the denial of intervention would mean that "the unions and their members may be forever foreclosed from challenging the goal mechanisms of the decree" due to the collateral attack rule, but the court concluded (*id.* at 23) that the unions and their members would not be prejudiced because the court considered their "probability of success on the merits" to be "slight." In a separate opinion, Judge Aldrich questioned (*id.* at 25) how the court was "able to determine the merits of [the unions'] case when they ha[d] not been allowed to present it."

2. As a result of a competitive examination held in April 1983, an eligibility list was established for the position of police captain in the MDC (Pet. App. 18a). On July 6, 1984, Donald E. Callender, a black police officer, was appointed to a provisional police captain position in the MDC, even though his score on the examination was lower than those of petitioners, who are five white MDC police officers (*id.* at 6a, 18a). Callender was appointed

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[3] *Stallworth* identified four factors to be considered in determining the propriety of permitting intervention: (1) the length of time the would-be intervenor knew or reasonably should have known of his interest before petitioning to intervene; (2) the prejudice to existing parties if intervention is granted; (3) the prejudice to the would-be intervenor if intervention is denied; and (4) the existence of unusual circumstances militating either for or against intervention (558 F.2d at 264-266).

in an effort to comply with the minority employment objectives established by the *Culbreath* consent decree (*ibid.*).

On July 16, 1984, petitioners filed the instant case against MDC officials. Petitioners alleged in their complaint that, although they all scored higher than Callender on the April 1983 competitive examination, they were denied the opportunity to be considered for the position of temporary police captain because of their race. They claimed that, but for their race, one of them would have been selected for the provisional captain position rather than Callender, and that Callender's selection therefore deprived them of rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. 1981 (Pet. App. 6a, 19a). The defendants moved to dismiss. Likewise, the plaintiff class in the *Culbreath* litigation filed motions to intervene as a defendant and to dismiss the case (*id.* at 6a, 19a-20a).

3. In November 1984, the district court granted the motion to intervene of the *Culbreath* plaintiff class and the motions to dismiss (*id.* at 16a-29a).[4] The district court found that petitioners' suit was "in essence an attack on the *Culbreath* consent decree" and therefore treated their action as "attempt to intervene in that case" (*id.* at 20a, 21a). In determining whether to permit such intervention, the court applied the factors adopted by the court of appeals, in *Culbreath* v. *Dukakis, supra.* The district court found that, but for this Court's decision in *Firefighters Local Union No. 1784* v. *Stotts*, No. 82-206 (June 12, 1984), the situation was the same as when it denied the prior petitions to intervene in 1980 (Pet App. 21a). It ruled that, absent *Stotts*, the governing factors required it to deny intervention and dismiss the case (*id.* at 21a-24a).

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[4] The court granted the motion of the *Culbreath* plaintiff class to intervene, "because the Class may wish to participate in any appellate review of this order" (*id.* at 29a).

The court then turned to the question whether *Stotts* changed Title VII law to such an extent that, under the fourth factor (see page 3 note 3, *supra*), it constituted an "unusual circumstance" militating in factor of intervention. In *Stotts*, this Court invalidated an injunction prohibiting the Memphis Fire Department from following its seniority system in determining who would be laid off and demoted, insofar as application of that system would decrease the proportion of black employees in certain ranks. The district court rejected petitioners' contention that *Stotts* invalidated the promotion quotas in the *Culbreath* consent decree (Pet. App. at 25a-28a). Finding that petitioners "seek too broad a rule from too narrow a set of facts," the court "decline[d] to read such an expansive meaning into an opinion limited to a discussion of layoffs made in violation of a bona fide seniority system" (*id.* at 28a).

4. The court of appeals affirmed (Pet. App. 1a-15a). Without elaboration, the court of appeals agreed with the district court that petitioners' complaint should be treated as a motion to intervene in *Culbreath*, since, if regarded as a separate action, it would constitute "an impermissible collateral attack on the *Culbreath* consent decree" (*id.* at 6a-7a). The court also agreed with the district court's ruling that *Stotts* did not affect the validity of the promotional goals in the *Culbreath* decree and accordingly did not constitute an "unusual circumstance" justifying intervention (*id.* at 7a).

The court of appeals distinguished *Stotts* on three grounds. First, the court stated, *Stotts* involved a district court's power to order retroactive relief not provided for in a consent decree over the objection of one of the parties to the decree, whereas petitioners in the present case challenged provisions in the consent decree to which the original parties had voluntarily agreed. Second, the court observed that the relief ordered by the district court in *Stotts* was in direct conflict with a bona fide seniority

system protected by Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), but that petitioners in this case did not claim a conflict between a seniority plan and the remedies in the consent decree. Third, the court stated that "the parties to the *Stotts* decree had expressly disclaimed that the violations alleged in the complaint existed, whereas in this case the parties stipulated that discriminatory patterns and practices existed that were sufficient to support a Title VII action" (Pet. App. at 12a).

The court cited a number of decisions of federal courts in support of its narrow interpretation of *Stotts* (Pet. App.at 12a-13a).[5] The court acknowledged, however, that "this is a difficult and sensitive area in which we and the other circuit courts could be mistaken in our reading of current precedent" (*id.* at 15a).

DISCUSSION

The first question presented by this case—*i.e.*, whether the "collateral attack" doctrine as applied by the courts below is consistent with due process—is an important and recurring question on which the circuits are in conflict. This doctrine, when coupled with holdings regarding timeliness of intervention, has frequently been applied to

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[5] *EEOC* v. *Local 638*, 753 F.2d 1172, 1186 (2d Cir. 1985), cert. granted, No. 84-1656 (Oct. 7, 1985); *Kromnick* v. *School District*, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, No. 84-606 (Jan. 7, 1985); *Wygant* v. *Jackson Board of Education*, 746 F.2d 1152, 1157-1158 (6th Cir. 1984), cert. granted, No. 84-1340 (Apr. 15, 1985); *Van Aker* v. *Young*, 750 F.2d 43, 45 (6th Cir. 1984); *Vanguards of Cleveland* v. *City of Cleveland*, 753 F.2d 479, 486 (6th Cir. 1985), cert. granted, No. 84-1999 (Oct. 7, 1985); *Grann* v. *City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir. 1984) (dicta), cert. denied, No. 84-304 (Oct. 15, 1984); *Diaz* v. *AT&T*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985) (dicta); *Turner* v. *Orr*, 759 F.2d 817, 823-826 (11th Cir. 1985), petition for cert. pending, No. 85-177; *Hammon* v. *Barry*, 606 F. Supp. 1082, 1095 (D.D.C. 1985); *NAACP* v. *Detroit Police Officers Association*, 591 F. Supp. 1194, 1202-1203 (E.D. Mich. 1984) (dicta).

deny would-be plaintiffs, such as petitioners here, any opportunity to be heard on the merits of their discrimination claims. Unless corrected, this doctrine will have a major, continuing impact.

The collateral attack doctrine was initially embraced by several circuits without full examination of the alternatives or of the rule's devastating impact on the ability of nonparties to protect their legitimate rights. As understanding of the competing concerns has grown, the courts have increasingly questioned the doctrine. In our view, the issue is now ripe for and fully warrants this Court's review.

This case presents two additional questions that also merit plenary review by this Court, *i.e.*, whether a consent decree in a Title VII action is subject to the limitations of Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g), and whether the use of racial quotas in awarding promotions is a permissible remedy under Section 706(g), as interpreted by this Court in *Stotts*.[6] The Court, however, has recently granted certiorari to review these questions in *Local 28, Sheet Metal Workers' Association* v. *EEOC*, cert. granted, No. 84-1656, (Oct. 7, 1985), and *Local No. 93, International Association of Firefighters* v. *City of Cleveland*, cert. granted, No. 84-1999, (Oct. 7, 1985). The Court's decisions in these cases may well be dispositive of these issues.

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[6] Petitioners suggest that a fourth question is also presented. *i.e.*, whether, in Title VII cases against public employers, such quotas violate the Equal Protection Clause of the Fourteenth Amendment. In denying intervention on timeliness grounds, however, the courts below did not address this question. Rather, intervention was denied as untimely solely because, in the lower courts' view, this Court's decision in *Stotts* did not invalidate the *Culbreath* promotion quotas and hence was not a recent change in decisional law weighing in favor of intervention. For this reason, the constitutional question proffered by petitioners is not properly before the Court at this stage of the proceedings.

Should the Court grant certiorari to review the validity of the collateral attack doctrine, it can dispose of the other issues on the basis of its decision in *Local 28* and *Local No. 93*. If the Court determines not to address the collateral attack doctrine at this time, it should hold the petition pending disposition of these two cases.

1. In accordance with the provisions of a 1979 Title VII consent decree, petitioners were passed over for promotion solely because of race. Ten days later, they sued their employer for illegal discrimination, but the district court and the court of appeals held that petitioners' claims were not entitled to be heard. The lower courts viewed their suit as "an impermissible collateral attack" on the consent decree (Pet. App. 6a-7a)—a decree into which neither petitioners nor any party representing them had entered. Because of their adherence to the collateral attack doctrine, the lower courts treated petitioners' suit as an attempt to intervene in the litigation that had resulted in the consent decree, and the courts concluded that this attempted intervention came too late. According to the lower courts, petitioners should have tried to intervene before the decree was entered—at a time when any harm to petitioners resulting from the decree would have been highly speculative. In our view, petitioners were denied elementary due process.

a. In recent years, several circuits and district courts, like the courts below in this case, have held that a nonparty to a consent decree may not attack action taken pursuant to the decree in a "collateral" (*i.e.*, independent) suit.[7] This doctrine has never been adopted or endorsed by this Court, and it has come under increasing attack, both

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[7] See, *e.g.*, *Thaggard* v. *City of Jackson*, 687 F.2d 66, 68-69 (5th Cir. 1982), cert. denied, 464 U.S. 900 (1983); *Dennison* v. *City of Los Angeles*, 658 F.2d 694, 695 (9th Cir. 1981); *Black & White Children* v. *School District*, 464 F.2d 1030, 1030-1031 (6th Cir. 1972) (per curiam); *Burns* v. *Board of School Commissioners*, 437 F.2d 1143,

in this Court and in the lower courts, as well as from legal scholars.[8] Indeed, the only Justices to address the issue, Justices Rehnquist and Brennan, have rejected the doctrine in circumstances analogous to those of the instant case. *Ashley* v. *City of Jackson,* 464 U.S. 900 (1983) (Rehnquist, J., joined by Brennan, J., dissenting from denial of certiorari). In *Ashley,* suits were brought by white plaintiffs challenging certain hiring and promotional decisions as racially discriminatory. Finding that the challenged decisions were the result of consent decrees entered in prior cases, the district court dismissed the suits as impermissible collateral attacks. The Fifth Circuit affirmed. *Thaggard* v. *City of Jackson,* 687 F.2d 66, 68-69 (1982).

In dissenting from the denial of certiorari, Justices Rehnquist and Brennan concluded that the court of appeals had "erred in holding that a district court cannot entertain a suit challenging practices allegedly mandated or permitted by a prior consent decree * * *" (*City of Jackson*, 464 U.S. at 900). Noting that plaintiffs' "cause of action did not even accrue until at least a year after the entry of the consent decrees" (*id.* at 902), the Justices found dismissal of the claim to be inconsistent with the fundamental principle that " '[i]t is a violation of due process for a judgment to be binding on a litigant who was not a

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1144 (7th Cir. 1971) (per curiam); *Prate* v. *Freedman,* 430 F. Supp. 1373, 1374-1375 (W.D. N.Y.), aff'd, 573 F.2d 1294 (2d Cir. 1977) (Table), cert. denied, 436 U.S. 922 (1978); *O'Burn* v. *Shapp,* 70 F.R.D. 549, 552-553 (E.D. Pa.), aff'd, 546 F.2d 418 (3d Cir. 1976)(Table), cert. denied, 430 U.S. 968 (1977); *Austin* v. *County of Dekalb,* 572 F. Supp. 479 (N.D. Ga. 1983).

[8] See, *e.g.*, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4458, at 117-118 n.38 (1985 Supp.) (criticizing the Fifth Circuit's application of the collateral attack doctrine in *Thaggard*). See also Swarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform,* 1984 Duke L.J. 887, 922.

party nor a privy and therefore has never had an opportunity to be heard' " (*ibid.*, quoting *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 327 n.7 (1979)). This principle, the Justices noted, is rooted in our " 'historic tradition that everyone should have his day in court.' " *Ibid.*

The Justices found this principle fully applicable to a judgment entered by consent, for while a consent decree binds the signatories, it "cannot be used as a shield against all future suits by nonparties seeking to challenge conduct that may or may not be governed by the decree" (464 U.S. at 902). The Justices could find "no justification, either in general principles of preclusion or in the particular policies implicated in Title VII suits, for the District Court's refusal to take jurisdiction over th[e] case" (*id.* at 904).[9]

For largely these reasons, the Eleventh Circuit recently rejected the collateral attack doctrine. In *United States* v. *Jefferson County,* 720 F.2d 1511 (1983), the court affirmed an order denying a request by a union and nonminority employees to intervene in pending lawsuits to challenge proposed consent decrees containing "affirmative action remedies in hiring and promotion" (*id.* at 1515). The Eleventh Circuit reasoned that the denial of intervention would cause "no prejudice" to the rights of the

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[9] Following the denial of review in *Ashley,* the Fifth Circuit expressed serious qualms about the collateral attack doctrine. The petitioners in *Ashley,* in addition to initiating independent suits, also attempted to intervene in the consent decree suits. In affirming the denial of intervention as untimely, the Fifth Circuit stated (*Corley* v. *Jackson Police Dep't,* 755 F.2d 1207, 1210 (1985)): "We are constrained to note that if the foregoing well-settled intervention rules in combination with the rule of *Thaggard* v. *City of Jackson,* to which we are firmly bound here, unjustly deny a party his day in court, then the appropriate remedy lies in reexamination of the *Thaggard* doctrine in the appropriate forum, particularly in light of the persuasive opinion of Justice Rehnquist, joined in by Justice Brennan, dissenting from the denial of certiorari in *Thaggard.*"

putative intervenors (*id.* at 1519) because, as nonparties, they would not be bound by the decree and could challenge actions taken pursuant to it in subsequent litigation (*id.* at 1517-1519). The court wrote (*id.* at 1518 (footnote omitted)):

> [S]ome courts have raised a specter that any action having a burden, financial or otherwise, on a consent decree is an "impermissible collateral attack" on the decree. We do not follow this path to the extent that it deprives a nonparty to the decree of his day in court to assert the violation of his civil rights.

See also *Reeves* v. *Wilkes*, 754 F.2d 965, 971-972 (11th Cir. 1985).

We agree with the Eleventh Circuit and Justices Rehnquist and Brennan that the collateral attack doctrine cannot be squared with fundamental principles of due process.

b. Because of its belief that the collateral attack doctrine precluded petitioners from maintaining an independent suit, the district court in this case treated petitioners' suit as a motion to intervene in the original suit. Had the court allowed intervention, the harm caused by the collateral attack doctrine might have been cured.[10] Instead, however, the court held that an attempt to intervene was untimely. The district court measured the timeliness of petitioners' attempted intervention from the dates on which the complaint and consent decree were filed in the original suit (Pet. App. 21a-22a), and the court of appeals concurred in this analysis (*id.* at 7a). Likewise, other courts of appeals, in denying intervention in analogous circumstances, have frequently measured timeliness of intervention from the filing of complaints or consent decrees, rather than from the date on which the would-be intervenor's cause of action

[10] However, petitioners might still have been prejudiced if the standard for relief (see, *e.g.*, Fed. R. Civ. P. 60(b)) was more demanding than that in an independent action.

allegedly accrued. See, *e.g.*, *Pennsylvania* v. *Rizzo*, 530 F.2d 501, 506-507 (3d Cir.), cert. denied, 426 U.S. 921 (1976); *Corley* v. *Jackson Police Dep't*, 755 F.2d 1207, 1209-1210 (5th Cir. 1985). See also *Culbreath* v. *Dukakis*, 630 F.2d at 20-21.

When coupled with the collateral attack doctrine, these holdings form a kind of jurisdictional pincers movement that often denies would-be plaintiffs/intervenors any opportunity to be heard—the quintessence of a denial of due process. *E.g.*, *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940); *General Foods* v. *Massachusetts Dep't of Public Health*, 648 F.2d 784, 787 (1st Cir. 1981). In our view, if petitioners were barred from maintaining an independent action by virtue of the collateral attack doctrine, due process requires that the timeliness of an attempt to intervene in the original suit must be measured from the time at which petitioners' interests were actually affected or were certain to be affected by implementation of the decree—that is, when their cause of action accrued.

Any other rule would extinguish rights before the injured party knows what has happened. Under the lower courts' holding, which apparently requires individual employees to seek intervention shortly after the initial complaint is filed, an incumbent employee is required to see into the future, to speculate on what his interests are likely to be, and to assess whether any of the likely outcomes of the ongoing litigation will adversely affect those speculative interests. If he concludes that the litigation may adversely affect those speculative interests, he must retain counsel and seek to intervene in the case to litigate his claim, even though the claim at that point has not yet accrued (and may never accrue) and is probably so speculative that he lacks standing to raise it. It is unreasonable to require individual employees to engage in such speculative litigation. Moreover, those adversely affected by a consent decree, which may remain in effect for

a decade or more, may include not only current employees but persons who have not even applied for employment or been hired when the decree is proposed and entered. Obviously such individuals are in no position to intervene at that time.

c. The principal reasons why the "collateral attack" doctrine was originally adopted by some lower courts in discrimination cases were respect for the finality of judgments and fear that conflicting judgments might result if a suit challenging the original decree were entertained. See, e.g., *Thaggard* v. *City of Jackson,* 687 F.2d at 68; *Dennison* v. *City of Los Angeles* 658 F.2d at 695; *O'Burn* v. *Shapp,* 70 F.R.D. 549 (E.D. Pa.), aff'd, 546 F.2d 417 (3d Cir. 1976) (Table), cert. denied, 430 U.S. 968 (1977). These are valid concerns, but the feared consequences can be prevented by far less drastic means.

The collateral attack doctrine is not needed to prevent conflicting decrees, because any subsequent action challenging the original decree can and generally should be transferred to the court that adjudicated the original case. See 28 U.S.C. 1404(a); Restatement (Second) of Judgments § 79 comment d (1982). In the present case, of course, even this was not necessary because both suits were brought in the same court.

The finality of judgments may be furthered by making unions and nonminority employees parties in the original litigation. In this case, however, both the original plaintiffs and the original defendants actively and successfully labored to prevent the unions and nonminority employees from achieving party status. First, the original plaintiffs successfully opposed joinder of nonminority employees.[11] *Jackson* v. *Sargent,* 394 F. Supp. 162 (D. Mass. 1975).

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[11] On the question whether a union should be regarded as an indispensable party under Fed. R. Civ. P. 19 in a discrimination suit that may have an adverse effect upon its members, see 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1620, at 202-204 (1972).

Second, both the original plaintiffs and the original defendants successfully resisted efforts by the unions to intervene prior to entry of the consent decree for the purpose of protecting the rights of their members. *Culbreath* v. *Dukakis, supra.* The upshot of this strategy, which was approved by the lower courts, was that the unions and nonminority employees remained nonparties and thus were not bound by the consent decree. Having intentionally achieved this result, neither the original parties nor the lower courts were in any position to complain when petitioners, making use of their rights as nonparties, brought suit challenging actions taken under the consent decree.

d. In sum, the collateral attack doctrine, coupled with the timeliness-of-intervention rule applied by the courts below, denied petitioners rudimentary due process—the right to be heard at some appropriate time on the merits of their discrimination claims. Because this doctrine has gained considerable acceptance among the lower courts, because the circuits are divided regarding its validity, and because of its devastating effect on individuals claiming discrimination, review by this Court is warranted.

2. The second and third questions presented in the petition concern this Court's decision in *Stotts.* In concluding that petitioners should not be allowed to intervene in the original lawsuit, the lower courts rejected the argument that this Court's decision in *Stotts* "so changed the law of Title VII that it constituted 'an unusual circumstance' militating for intervention" under the court of appeals' governing precedent (Pet. App. 7a (footnote omitted)). The district court held that "*Stotts* is simply inapplicable to this case" (*id.* at 29a), and the court of appeals concurred (*id.* at 6a), while nevertheless confessing that it "could be mistaken" (*id.* at 15a).

In our view, the courts below were indeed "mistaken" in concluding that *Stotts* did not affect the promotion quotas at issue in this case. For the reasons set out in our briefs in

support of the petitions for certiorari in *Local 28, Sheet Metal Workers' International Association* v. *EEOC, supra,* and *Local No. 93, International Association of Firefighters* v. *City of Cleveland, supra,* we believe that Section 706(g) applies to Title VII consent decrees and, as this Court stated in *Stotts,* prohibits racially preferential relief to persons who are not victims of the employer's discrimination. In addition, as those briefs make clear, we believe that the courts below erred in interpreting *Stotts* as invalidating only those racial quotas that impinge upon bona fide seniority systems.[12]

This Court's decisions in *Local 28* and *Local No. 93* are likely to be dispositive of the second and third questions presented in this case. Should the Court grant certiorari to consider the collateral attack issue presented here, it can dispose of the other issues on the basis of its decisions in *Local 28* and *Local No. 93.* Should the Court elect not to address the collateral attack issue at this time, it should hold the present case pending its decisions in these two cases, since a decision by this Court regarding the effect of *Stotts* on racial quota remedies in Title VII cases will have a direct bearing on the question whether petitioners should have been denied intervention on timeliness grounds.

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[12] *Local No. 93* presents the question whether a district court may enter a consent judgment that bestows promotional preferences based upon race on persons who are not proven victims of discrimination. *Local 28* presents the question whether as a remedy in a Title VII action, or as a civil contempt remedy for violation of a Title VII judgment, a court may award preferences based solely upon race or ethnic background, rather than on the beneficiary's status as an actual victim of discrimination. We are serving copies of our briefs in *Local 28* and *Local No. 93* upon the parties in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the Court may wish to hold the petition pending disposition of *Local 28* and *Local No. 93, supra.*

Respectfully submitted.

CHARLES FRIED
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

CHARLES J. COOPER
Deputy Assistant Attorney General

SAMUEL A. ALITO, JR.
Assistant to the Solicitor General

BRIAN K. LANDSBERG
MICHAEL CARVIN
DENNIS J. DIMSEY
Attorneys

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